314 U.S. 61
(21)
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No 615

# Supreme Court of the United States.

OCTOBER TERM, 1941.

CHARLES W. GAMMONS, FRANK B. LAWLER, AND LUTHER HILL, EXECUTORS AND TRUSTEES UNDER THE WILL OF BRYAN R. HOUGHTON, *Plaintiffs, Appellants, Petitioners,*

*v.*

THOMAS B. HASSETT, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, *Defendant, Appellee, Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

## BRIEF IN SUPPORT THEREOF.

HAROLD WILLIAMS,
Attorney for Petitioner.

LUTHER HILL,
Of Counsel.

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# Supreme Court of the United States.

OCTOBER TERM, 1941.

CHARLES W. GAMMONS, FRANK B. LAWLER, AND LUTHER HILL, EXECUTORS AND TRUSTEES UNDER THE WILL OF BRYAN R. HOUGHTON, *Plaintiffs, Appellants, Petitioners,*

*v.*

THOMAS B. HASSETT, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, *Defendant, Appellee, Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.*

The petitioners, Charles W. Gammons, Frank B. Lawler, and Luther Hill, Executors and Trustees under the will of Bryan R. Houghton, late of Stoneham, Massachusetts, pray that a writ of certiorari may issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered June 27, 1941, affirming the judgment of the District Court of Massachusetts entered January 31, 1941, in an action for refund of an estate tax deficiency assessment upon a residuary gift to charities.

### Opinions Below.

The opinion of the District Court (R. 38) is reported in 36 F. Supp. 529. The opinion of the Circuit Court of Appeals (R. 111) is reported in 121 F. (2d) 229.

## Jurisdiction.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, C. 229, Sec. 1; 43 Stat. 938; U.S. Code, Title 28, Sec. 347.

This petition is filed within three months from the date of the rendering of the judgment of the Circuit Court of Appeals as required by Section 8 of the Act of February 13, 1925, C. 229; 43 Stat. 940; U.S. Code, Title 28, Sec. 350.

## Questions Presented.

1. Whether the estate tax deficiency assessed upon the residuary gift to charities was improperly assessed and should be refunded.

2. Whether the residuary gift to the charities was so uncertain at the date of the testator's death that it was not deductible from the gross estate for the purpose of determining the estate tax, and was therefore taxable.

3. Whether, in determining if a residuary gift to charity is too uncertain to be deductible from the gross estate for estate tax purposes, the Court is arbitrarily limited to the wording of the will creating the gift, or whether the question is one of fact depending on all the circumstances existing at the testator's death.

## Statute Involved.

Revenue Act of 1926, C. 27, 44 Stat. 9:

"Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

. . . . . .

"(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . ." (U.S. Code, Title 26, Sec. 412.)

**Statement.**

There is no controversy as to figures, either as to the correctness of the amount of the deduction claimed in the estate tax return, or of the deficiency tax assessed because of the disallowance of the deduction.

The facts as found by the District Court appear in the opinion of the District Court (R. 38), the Stipulation of Facts (R. 11), and the Plaintiffs' Requests for Findings of Fact (R. 34) so far as given in substance in the opinion (R. 41).

Bryan R. Houghton died June 30, 1936, at the age of ninety-two, leaving a widow, Mary F. Houghton, aged ninety-three. The couple had never had any children and Mr. Houghton had no near relatives (R. 38).

By Article III, paragraph 1, of Mr. Houghton's will the residue was given to trustees:

> "to be held by them, the income thereof, after paying all reasonable expenses of the trust, including a reasonable compensation for the services of my trustees, and so much of the principal thereof as my said wife may at any time and from time to time need or desire, to be paid to my said wife during her life." (R. 16.)

The widow had no power of disposition by will. Upon the death of the wife, the trustees were to divide the residue

equally between the New England Grenfell Association, of 25 Huntington Avenue, Boston, Massachusetts, and the Society for the Prevention of Cruelty to Animals of Boston, Massachusetts, free and discharged of any trust (R. 17). The charities named are charitable corporations within the Revenue Acts (R. 13).

At the time of Mr. Houghton's death, his gross estate had a fair valuation of approximately $275,000.00. On the same date his wife's property had a fair valuation of approximately $190,000.00 (R. 39). The Houghtons had lived for more than forty years in a house valued at $7,000.00. Their wants and mode of life were very conservative and their combined income, which varied between $15,000.00 and $25,000.00 a year, was greatly in excess of their needs (R. 39). Their standard of living was fixed in fact and was definitely ascertained in terms of money and their combined incomes were greatly in excess of what they needed or desired to maintain their standard of living (Plaintiffs' Requests Nos. 3 and 4, R. 34; granted, R. 41).

At the time of her husband's death, Mrs. Houghton, aged ninety-three, had been bedridden for at least two years. She had been unable to handle her business affairs. Mr. Houghton handled them for her. Her physical condition was such at the time of his death that it was immediately necessary that someone else take charge of her affairs. This was evidenced by the fact that a conservator was appointed on July 8, 1936 (before the will was probated, R. 12), to assume charge of her property (R. 38).

Mrs. Houghton by a codicil executed May 29, 1936, coincidentally with the execution of Mr. Houghton's last codicil, had left the residue of her estate after her husband's death to the trustees under his will to be added to the trust that he set up for the two charities referred to therein (R. 39).

The trial judge found that

> "It is reasonable to assume that Mr. Houghton did not expect that she would have any reason to invade the corpus of his trust, and it may be further assumed, since she had shown a decided interest in the two charities involved, that she would restrain from destroying his charitable gift *by her mere whim.*" (Italics ours.) (R. 40.)

The District Court, while its findings show that there was no need, or inclination, or even any capability, on the part of the widow to invade principal or any likelihood that she would attempt to do so, based its decision for the defendant solely on the wording of the will (R. 40, 41). The Circuit Court of Appeals affirmed the decision.

**Specification of Errors to be Urged.**

The Circuit Court of Appeals erred

1. In holding that the deductibility of the gift to charities must depend exclusively on the extent of the power given the wife to invade principal by the terms of the will, regardless of the circumstances existing at the testator's death bearing on the possibility of such invasion.

2. In not deciding that the gift over to charities was deductible, because at the instant of the testator's death there was no uncertainty that the charities would receive the gift in full on the termination of the life estate, appreciably greater than the general uncertainty that attends human affairs.

3. In affirming the judgment of the District Court.

4. In holding that it was unnecessary to construe the power given the life tenant in accordance with the law of Massachusetts; and in deciding the question of local law in a way in conflict with applicable local decisions.

**Reasons for Granting the Writ.**

1. The decision of the Circuit Court of Appeals is contrary to the law as established by the decisions of this Court.

> *Ithaca Trust Co.* v. *United States,* 279 U.S. 151.
> *United States* v. *Provident Trust Co.,* 291 U.S. 272.

2. The decision of the Circuit Court of Appeals is in conflict with decisions of the Circuit Court of Appeals in the Second, Third, Fifth, Eighth and Tenth Circuits.

3. The decision of the Circuit Court of Appeals on the question of Massachusetts law is contrary to the decisions of the Courts of Massachusetts.

4. The result of the decision is that a gift to charity is taxed, contrary to the letter and spirit of the Revenue Act.

**Prayer.**

Wherefore the petitioners respectfully pray that this petition should be granted.

Respectfully submitted,

CHARLES W. GAMMONS,
FRANK B. LAWLER,
LUTHER HILL,
Executors and Trustees under
the will of Bryan R. Houghton,
By HAROLD WILLIAMS,
Their Attorney.

LUTHER HILL,
Of Counsel.

## BRIEF IN SUPPORT OF PETITION.

### Statement.

The reference in the petition to the official reports of the opinions delivered in the Courts below, the statement of the grounds on which the jurisdiction of this Court is invoked, the statute involved, the statement of the case, and the specification of errors to be urged, all as set forth in the petition, are incorporated by reference into this brief.

### Summary of Argument.

The ultimate question on this record is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction cannot be allowed.

The deductibility of a remainder to charity depends on whether it is presently ascertainable at the date of the testator's death. If it is subject to no uncertainty appreciably greater than the general uncertainty that attends human affairs it is deductible.

The facts as found show that there was no such uncertainty that the charities will receive the full amount of the residuary gift, and therefore the deficiency tax was erroneously assessed and should be recovered.

The Court should grant the petition because the decision of the Court below is in conflict with the decisions of this Court, and in conflict with the decisions of Circuit Courts of Appeals in five other Circuits, and decides a question of Massachusetts law contrary to local decisions.

### Argument.

1. The issue is whether the gift over to charity is so uncertain of realization that its value cannot be ascertained

for purpose of deduction from the gross estate for estate tax purposes. It results from the facts found by the trial Court, and is conceded in the opinions in the Circuit Court of Appeals that there is no appreciable uncertainty in fact that the charities will receive the gift in full. The possibility of a whimsical desire to destroy the charitable remainder, even if it could legally be entertained, cannot be inferred from the circumstances existing at the testator's death.

The basis of the opinions below is that the extent of the power given the wife to invade principal *by the terms of the will* makes the gift over uncertain as matter of law, irrespective of the facts. It is submitted that this is an erroneous conception of the law.

2. The law on this subject is stated in *Ithaca Trust Co. v. United States*, 279 U.S. 151. In that case there was a trust for the wife for life with a provision for use of principal and a gift over to charity, and the first question before the Court was whether the gift over was deductible or, as the Court put it, on page 154:

> "whether the provision for the maintenance of the wife made the gift to charity so uncertain that the deduction . . . cannot be allowed."

Under the terms of the will the wife could use the principal so far as "might be necessary to continue the comfort then enjoyed" and the determination of the amount to be so used was not left to her discretion. The Court did not confine its consideration to the phraseology of the bequest, but proceeded to consider the state of facts bearing upon the probability that the gift to charities would ultimately be received. The Court took into consideration the wife's standard of living and found that "the standard was fixed

*in fact* and capable of being stated in definite terms of money" (italics ours), and also the fact that the income was more than sufficient to maintain that standard of living. Thereupon the Court found as to the residuary gift that "there was no uncertainty appreciably greater than the general uncertainty that attends human affairs," and allowed the deduction.

It has been argued that the wording of the statute exempting "bequests . . . to or for the use of any corporation organized and operated exclusively for charitable purposes" (Revenue Act 1926, C. 27, 44 Stat. 9, as amended) confines the inquiry to the literal meaning of the words used in that part of the will creating the bequest; and that the *Ithaca* case "set a standard" in the sense of prescribing a definite form of bequest within which all charitable gifts must fall if they are to be exempted from taxation. An analysis of the decision, however, shows that the Court was not attempting to draw a printed form for a non-taxable charitable gift. The Court was not concerned with the definition of a testamentary provision, which is distinctly a matter of state law,

*Lyeth* v. *Hoey*, 305 U.S. 188,

but was dealing with a question of taxation involving an application of the revenue law to a certain state of facts. Application of federal tax laws depends on actualities and not on how state Courts characterize them.

*Morgan* v. *Commissioner*, 309 U.S. 78.

Taxation has been said to be "an intensely practical matter."

*Farmers Loan & Trust Co.* v. *Minnesota*, 280 U.S. 204.

Had the facts in the *Ithaca* case been different, for instance, had the income been insufficient for the required provision, so that principal must have been used, there can be no doubt that the Court would have found the gift uncertain and denied the deduction.

In the case at bar, if Mrs. Houghton had died before the testator or if her conservator had been appointed a few days earlier, or if she had been insane and legally incompetent to entertain any desire to invade principal, the existence in the will of a power to do so, however extensive, could not have destroyed the deductibility of the charitable gift.

In *United States* v. *Provident Trust Co.*, 291 U.S. 272, there was a trust for the daughter for life, then to her issue, and on her death without issue then to charities. As far as the language of the will was concerned, the gift over, being contingent on an indefinite failure of issue, would manifestly have been too uncertain for deduction (*Humes* v. *United States*, 276 U.S. 487). The Court, however, took into consideration the fact that the daughter had undergone an operation so that it was impossible that she could ever have a child. The contention was made that the language of the will alone must govern, and that evidence *in pais* could not be introduced to rebut the presumption that a woman of any age can have a child. The Court held, at page 285:

> "We have for consideration simply a statutory provision exempting from a prescribed tax the value of all bequests, etc., made to or for the use of charitable organizations and those which are akin, plainly evincing a legislative policy to encourage such bequests. *Edwards* v. *Slocum*, 264 U.S. 61, 63. And in that view we may well assume that Congress could not have meant to leave its aim to be diverted by a purely arbitrary assumption, which, whether applicable or not to *sustain* another or different policy would deny the truth and *subvert* the policy of this particular legislation."

In the case at bar it was found as fact, just as it was in the *Ithaca* case, that the standard of living was fixed in fact and was definitely ascertained in terms of money and that the income was largely in excess of what was needed or desired to maintain that standard (Plaintiffs' Requests for Findings of Fact Nos. 3 and 4, R. 34; granted, R. 41).

The trial judge in effect found that the only way in which invasion of principal need be apprehended was by a whimsical desire to destroy the charitable remainder and that it might be assumed that she would refrain from destroying his charitable gift by her mere whim (R. 40).

The majority opinion of the Circuit Court of Appeals grants that the likelihood of invasion was "extremely remote" (R. 117). The concurring opinion says that, practically "the remaindermen are at least as well assured, perhaps somewhat better assured of receiving the corpus intact upon the death of the life tenant" than in the *Ithaca* case (R. 121).

Yet that Court attempts to lay down a rule, in order to save litigation, that imposes an artificial and verbal test, in place of a simple issue of fact (R. 120, 122). It is submitted that such a rule is in contravention of existing law.

3. The principle of the *Ithaca* case, that the uncertainty affecting deductibility is a question of fact and not of form, has been followed in five Circuits.

In the Second Circuit:

> *Hartford-Connecticut Trust Co.* v. *Eaton,* 36 F. (2d) 710,

where the Court said "there was no reasonable possibility" of resort to principal.

> *City Bank Farmers Trust Co.* v. *United States,* 74 F. (2d) 692,

the latter case following

*United States* v. *Provident Trust Co.*, 291 U.S. 272.

In the Third Circuit:

*Brown* v. *Commissioner of Internal Revenue*, 50 F. (2d) 842.

In the Fifth Circuit:

*First National Bank of Birmingham* v. *Snead*, 24 F. (2d) 186,

where the Court said that impairment was barely possible but wholly improbable and that the possibility was so remote that to find that the charitable gifts were of no substantial value would be "arbitrary and unwarrantable."

In the Eighth Circuit:

*St. Louis Union Trust Co.* v. *Burnet*, 59 F. (2d) 922.

In the Tenth Circuit:

*Commissioner* v. *Bonfils*, 115 F. (2d) 788,

where the "possibility of invasion of corpus is so remote as to be negligible" and the Court said, on page 791:

> "The determination of this question turns on whether we should blindly adhere to the terms of the will which provide for recourse to corpus in the event income is insufficient to pay annuities, or whether we should be realistic and determine the effect of the terms of the will, in the light of the amount of the

corpus, the income therefrom, and the amount of the annuities. In other words whether we should give regard to mere theory or to actuality."

4. The opinion below relies on two decisions, *Humes* v. *United States,* 276 U.S. 487, and *Knoernschild* v. *Commissioner,* 97 F. (2d) 213.

The *Humes* case was not the case of a vested interest subject to possible impairment, but a gift over subject to a succession of contingencies as to which it could not be predicted which, if any, of them would ever occur. In the *Knoernschild* case the life tenant had power to use principal to give financial aid to her mother, brothers, and sisters, of whom several at least were living. The charitable gift over was of course impossible of definite ascertainment.

Neither of these decisions is inconsistent with the *Ithaca* case, or with the petitioners' contention. Neither is authority for the proposition that the surrounding circumstances are to be disregarded.

It is significant that, in view of the considerable amount of judicial authority on the subject, no stronger support for the Court's position could be found.

5. The Court held that it was not bound to "pass finally" on the question of Massachusetts law whether the life tenant could exercise her power to use principal from a whimsical desire to destroy the charitable remainder (R. 117). Yet it did in effect decide this question, and decided it contrary to local law, which attaches to any power however broad a fiduciary duty in its exercise.

*Merchants Trust Co.* v. *Russell,* 260 Mass. 162.
*Dumaine* v. *Dumaine,* 301 Mass. 214.
*Cotton* v. *Danville,* 301 Mass. 380, 385.

This additional error, however, does not become material if the Court grants this petition on the broader grounds already contended for.

6. The intent of Congress to encourage gifts to charity by making them deductible from the gross estate for estate tax purposes should not be defeated by reading into the law an artificial judicial limitation, destroying the legislative intent, by taxing a charitable gift.

*United States* v. *Provident Trust Co.*, 291 U.S. 272.

**Conclusion.**

The petitioners respectfully submit that their petition should be granted.

Respectfully submitted,

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Attorney for the Petitioners.

LUTHER HILL,

Of Counsel.

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# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 615

CHARLES W. GAMMONS ET AL., EXECUTORS AND TRUSTEES, PETITIONERS

*v.*

THOMAS B. HASSETT, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the District Court (R. 38–41) is reported in 36 F. Supp. 529. The opinion of the Circuit Court of Appeals for the First Circuit (R. 111–121) is reported in 121 F. (2d) 229.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1941 (R. 121). The petition for a writ of certiorari was filed September 15, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Where an estate was left in trust to the testator's widow for life, with the express power to invade the principal of the estate to the extent that she might at any time need or desire, with a remainder over to charity, is the bequest to charity sufficiently definite and ascertainable as of the date of the testator's death to be exempt from estate tax under Section 303 (a) (3) of the Revenue Act of 1926?

### STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, 44 Stat. 9:

> SEC. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *. (U. S. C., Title 26, Sec. 412.)

Treasury Regulations 80 (1934 Ed.):

> ART. 44. *Transfers for public, charitable, religious, etc., uses.*—* * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use.

* * * * *

ART. 47. *Conditional bequests.*—* * *

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

**STATEMENT**

The facts, as stipulated (R. 11–14) and as found by the District Court (R. 38–39), may be summarized as follows:

Bryan R. Houghton died on June 30, 1936, at the age of 92, leaving a widow, Mary F. Houghton, aged 93. The couple had no children (R. 11, 38). Petitioners are the executors of Mr. Houghton's estate as well as the trustees under his will (R. 12). Article III, paragraph 1, of Mr. Houghton's will (R. 16–17) provides that the residuary estate should be given to trustees

* * * to be held by them, the income thereof, after paying all reasonable expenses

> of the trust, including a reasonable compensation for the services of my Trustees, and so much of the principal thereof as my said wife may at any time and from time to time need or desire, to be paid to my said wife during her life.

Paragraph 3 of Article III directs the trustees, upon the death of Mrs. Houghton,

> * * * to transfer, make over and distribute the rest, residue and remainder of my estate to the New England Grenfell Association, of 25 Huntington Avenue, Boston, Massachusetts, and the Society for Prevention of Cruelty to Animals, of Boston, Massachusetts, share and share alike, free and discharged of any trust.

It is agreed that the New England Grenfell Association and the Society for Prevention of Cruelty to Animals are charitable corporations.

At the time of Mr. Houghton's death his gross estate had a fair valuation of approximately $275,000. On the same date his wife's property had a fair valuation of approximately $190,000. The Houghtons had lived for more than forty years in a house worth about $7,000. Their wants and mode of life were very conservative and their combined income, which varied between $15,000 and $25,000 per year, was greatly in excess of their needs (R. 39).

At the time of her husband's death, Mrs. Houghton was bedridden and had been unable to handle

her affairs for about two years. During this period Mr. Houghton had given her much assistance in that respect. After his death it was necessary to appoint a conservator for her. She is mentally alert though still confined to her bed (R. 38).

Mrs. Houghton, by a codicil executed May 29, 1936, coincidentally with the execution of Mr. Houghton's last codicil, had left the residue of her estate after her husband's death to the trustees under his will to be added to the trust that he had set up for the benefit of the two charities referred to therein (R. 39).

In the federal estate tax return filed by petitioners a deduction in the sum of $170,779.04, being the alleged value of the decedent's residuary estate, was claimed for a charitable gift (R. 12–13). The Commissioner disallowed this deduction and assessed a deficiency accordingly (R. 13–14). Petitioners paid the amount of the deficiency to respondent as Acting Collector of Internal Revenue, filed a claim for refund which was disallowed, and then instituted the present suit (R. 14). The trial court denied recovery (R. 41) and the court below affirmed (R. 121).

## ARGUMENT

The court below properly concluded that as of the date of death, the bequest to charity was indefinite and unascertainable as to amount, because of the unlimited power given the life tenant to

invade the principal of the estate at any time she might desire. The widow's right to demand a part or all of the corpus of the estate was not limited or restricted to her needs, or in any other way. Only in the event that she should die without having used the corpus of the estate for her own purposes would the charitable organizations be entitled to anything. Cases of this type must be governed by the existence of the power rather than the likelihood of its use, as shown by the extrinsic circumstances, which, of course, vary in each particular case.

*Ithaca Trust Co.* v. *United States,* 279 U. S. 151, and *United States* v. *Provident Trust Co.,* 291 U. S. 272, upon which petitioners primarily rely (Pet. 6), are clearly distinguishable. In the *Ithaca Trust Co.* case, the life tenant could only invade the corpus of the trust if *necessary* to continue the comfort then enjoyed. The standard was fixed in fact and since the income was more than sufficient to meet that standard the power there was not such as to make the gift over to charity uncertain. In the case at bar, however, the power to invade the principal was not restricted to the life tenant's needs; rather, she could at any time and for any reason use more than the income. Accordingly, the court below properly concluded (R. 117) that there was no standard fixed in fact by which it could measure either the extent of the life tenant's desires or the

likelihood of the exercise of those desires. See *Humes* v. *United States,* 276 U. S. 487; *Knoernschild* v. *Commissioner,* 97 F. (2d) 213 (C. C. A. 7).

In the *Provident Trust Co.* case, *supra,* the estate was left to the daughter of the deceased for life, then to her issue, and if she died leaving no issue, then to charity. This Court ruled that since it was impossible for the daughter to have issue because of an operation, there was no uncertainty in connection with the bequest to charity. The court below properly observed (R. 116) that both that case and the *Ithaca Trust Co.* case, *supra,* involved a quality of certainty not present in the instant case.

Similarly, the decisions of the circuit courts of appeals cited by petitioners [1] (Pet. 11–13) are not controlling since their facts differ in critical respects. In all, the degree of certainty that the charitable bequest would take effect was far greater, and in none was the charity's ultimate receipt dependent wholly upon the unrestricted wishes of an individual.[2] The characteristic dis-

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[1] Petitioner cites these cases in support of the proposition that "the uncertainty affecting deductibility is a question of fact and not of form" (Pet. 11). We do not dispute this.

[2] *City Bank Farmer's Trust Co.* v. *United States,* 74 F. (2d) 692 (C. C. A. 2) involved a life estate in the testator's daughter, then to her issue, and then to charity. The daughter was 59 years old, and without issue at the testator's death. The court, relying on birth statistics, ruled that there was no

tinguishing the instant case is simply that here the widow was vested with the broadest power to use so much of the corpus as she might "desire." Such power carries into the realm of speculation the ultimate benefits, if any, which the designated charities might receive.[3]

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uncertainty. In both *Hartford-Connecticut Trust Co.* v. *Eaton*, 36 F. (2d) 710 (C. C. A. 2) and *First Nat. Bank* v. *Snead*, 24 F. (2d) 186 (C. C. A. 5), only the trustee had power to invade the corpus, and then only to the extent that he deemed necessary or advisable for the beneficiary's comfortable maintenance and support. In both cases the income was clearly adequate to support the beneficiary according to her station in life. In *Commissioner* v. *F. G. Bonfils Trust*, 115 F. (2d) 788 (C. C. A. 10), the corpus could be invaded only if necessary to meet fixed annuities. The annuitants were elderly and the income from the trust was almost five times the amount required to pay the annuities.

*Brown* v. *Commissioner*, 50 F. (2d) 842 (C. C. A. 3) and *St. Louis Union Trust Co.* v. *Burnet*, 59 F. (2d) 922 (C. C. A. 8) are not in point. Both concerned the sufficiency of description of charitable objects. Insofar as the *St. Louis Union Trust Co.* case dealt with the issue of certainty, it was decided contrary to the taxpayer in that case.

[3] The circumstances might well be such that the widow might choose to invade the corpus for far less whimsical reasons than the desire to spend extravagantly: While indeed it is unlikely that she would "blossom out with a desire to buy a yacht," it is not impossible that changing circumstances might lead her to choose charities or causes different from those designated by the testator.

## CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. The petition for writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941